

Virginia Coastal Resources Management Program

Appendices

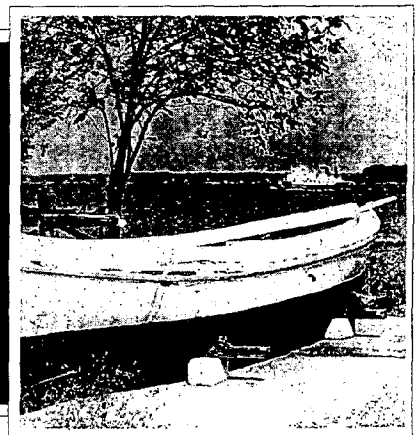
Routine Program Implementation Changes
July 1985 - May 1994

DEPARTMENT OF ENVIRONMENTAL QUALITY
COMMONWEALTH OF VIRGINIA

629 East Main Street, 6th Floor
Richmond, Virginia 23219

May 1994

VIRGINIA
COASTAL RESOURCES
MANAGEMENT PROGRAM



The Virginia Coastal Resources Management Program links state programs to manage coastal resources. The program's coastal boundary includes the 29 counties and 15 cities within Tidewater Virginia. The program is coordinated and monitored by the Virginia Council on the Environment. **DEQ**

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Appendix I

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

Addition of Legislative Changes to the Coastal Primary Dune Protection Act, October 1988

October 31, 1988

VCRMP RPI Number One

Program Change: Routine Program Implementation

Title: The addition of legislative changes to the Coastal Primary Sand Dune Protection Act

Description: The Coastal Primary Sand Dune Protection Act, as amended in 1985, is a regulatory policy of the Virginia Coastal Resources Management Program, as approved in 1986. In March of 1987, the Virginia legislature made changes and additions to the language in the 1985 amendment (see Appendix I-1). These changes served to more clearly delineate the Sandbridge Beach area in jeopardy from erosion, protected the rights of adjacent property owners, and supplied measures designed to prevent the possibility of erosion between adjoining but non-contiguous bulkheads.

The description was changed to read:

"...the area bounded on the north by Dam Neck Naval Base, on the west by Sandfiddler Road, and on the south by White Cap Lane..."

The new language also states that the properties of those homeowners who wish to erect bulkheads must, in determination of the Virginia Beach Wetlands Board, subject to review by the Virginia Marine Resources Commission (VMRC), be, "...in clear and imminent danger from erosion and storm damage due to severe wave action or storm surge."

Other language appended to the Act required the applicant(s) to obtain written consent from adjacent property owners for the construction of the bulkhead, and required that the applicant(s) consent to allow those adjacent owners to tie in to said bulkhead, at some future time, at no additional cost.

The 1988 legislature eliminated the requirement for adjacent property owner's consent to proposed construction of bulkheads. It further requires that such construction be completed in three years (see Appendix I-1).

Appendix I-2 presents the opinion of the Attorney General's office on the legality of the Virginia Beach Wetlands Board action declaring an emergency at Sandbridge.

Effects of Program Change on Enforceable and/or Advisory Policies: These changes reflect a clarification in the enforceable authority of the VMRC's primary sand dune regulations as adopted by the Virginia Beach Wetlands Board. It restricts bulkheading or structural improvements to those properties in danger of erosion from severe forces, thereby closing a "loophole" which could have allowed any Sandbridge beachfront property owner to erect structural improvements without regard to

the properties' susceptibility to erosion. It also allows the Wetlands Board to preclude the possibility of erodible gaps between the bulkheads by allowing them to be integrated or "tied in" at their junction.

These changes will allow for a more critical review of applications for structural improvement along the Sandbridge oceanfront.

The change will be incorporated into Chapter III, Core Regulatory Program, p. 9, Dunes Management. Paragraph four under this subsection will be changed to read:

"The Coastal Primary Sand Dune Protection Act (Virginia Code Section 62.1-13.21 through 62.1-13.28 as amended and re-enacted in 1987 and 1988)."

Program Change Meets Approval Criteria: This proposal meets approval criteria by clarifying the existing program under Chapter III, p. 9, D., Dunes Management, to prevent misconstruction.

The State of Virginia considers this change to be a routine program implementation and requests concurrence in that determination by the OCRM.

Appendix II

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

**401 Certification Addition to Point Source
Water Pollution Control Regulatory Program, October 1988**

October 31, 1988

VCRMP RPI NUMBER TWO

Program Change: Routine Program Implementation

Title: 401 Certification Addition to Point Source Water
Pollution Control Regulatory Program

Description: The VCRMP already contains a core regulatory program addressing point source water pollution control, including the State's National Pollution Discharge Elimination System (NPDES) permit program. The purpose of this program change is to add the State's 401 certification program as authorized by the Clean Water Act to the point source water pollution control regulatory program of the VCRMP.

Implementation of Section 401 of the Clean Water Act is vital to successful protection of water quality and living resources in Virginia's coastal zone. Applicants for federal Section 404 permits (and other permits) to conduct any activity, including but not limited to the construction or operation of facilities which may result in a discharge to State waters, must provide the federal permitting authority with a certification from the State Water Control Board (SWCB) in accordance with Section 401 of the federal Clean Water Act. The certification sets forth any effluent limitations and other limitations and monitoring requirements necessary to comply with the Clean Water Act and the State Water Control Law. These conditions then become a part of the federal license or permit.

The application for 401 certification shall be filed prior to or concurrently with the application for the federal permit or license for which 401 certification is required. The Army Corps of Engineers and Virginia Marine Resources Commission provide Joint Permit Applications through which application for 401 certification can be made. The final authority for issuance of a 401 certification rests with the State Water Control Board pursuant to Virginia State Code Section 62.1-44.2 et. seq. (see Appendix II-1 and II-2) and is further explained in the SWCB Procedural Rule No. 3 (see Appendix II-3).

It is the opinion of the SWCB's Deputy Executive Director for Policy that there is no provision for EPA delegation of the 401 program since the federal statute itself requires state certification (see Appendix II-4).

Effects of Program Change on Enforceable and/or Advisory Policies: Section 401 certification will be expanded in the VCRMP as part of Core Regulatory Program F to address point source water pollution control. It is important that the Commonwealth's 401 certification, which will be a part of the Army Corps of Engineer's Section 404 permit, be explicitly defined as a core regulatory program of the VCRMP. This will

strengthen the ability of the Commonwealth to review Section 404 permit applications and permit decisions for consistency with the VCRMP.

The inclusion of the State Water Control Board's 401 Certification Program in the VCRMP will allow Virginia to support the goal of protecting water quality and living resources in the coastal zone in areas where present core regulatory programs provide no jurisdiction. The effect will be to strengthen the Commonwealth's ability to influence how development occurs in the coastal zone, but it will not create new regulatory burdens with regard to development activities planned for the coastal zone.

The proposed changes to the VCRMP will be inserted in the VCRMP document in Chapter III as part 3 of core regulatory program F. The SWCB Procedural Rule 3 will be inserted as Appendix III-13. The "Part I - Overview" section of the VCRMP will be expanded slightly to incorporate the addition of 401 certification to the existing Core Regulatory Programs.

Program Change Meets Approval Criteria: The proposed program change will strengthen our ability to make constructive suggestions on project design when a Section 404 permit is needed. The Commonwealth of Virginia considers this a routine program implementation change and requests concurrence in that determination by OCRM.

Appendix III

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

**Use of Tributyltin (TBT) Compounds
Regulatory Program, October 1988**

October 31, 1988

VCRMP RPI NUMBER THREE

Program Change: Routine Program Implementation

Title: Use of Tributyltin (TBT) compounds - Regulatory Program

Description: The purpose of this program change is to incorporate the State's (TBT) regulatory program into the VCRMP.

Tributyltin is a chemical compound used as a pesticide to prevent the growth of barnacles and other undesirable marine organisms. Restricting such growth reduces drag between water and the outer boat hull thus increasing speed and maneuverability while reducing fuel costs. It also reduces the time a boat must be in dry dock for cleaning.

TBT pesticide is mixed (free-associated) or bonded, (copolymer) with boat paints where it slowly leaches into the water, killing aquatic life that can foul the boat hull. The largest portion of TBT detected in both fresh and salt water originates from boat hulls coated with TBT paint. In the late 1970's, it was discovered that TBT was affecting more than just fouling organisms. TBT paint (tin-based) is 7 to 40 times as toxic to barnacles as traditionally used copper based-paint. It is lethal at even extremely low concentrations, measured in parts per trillion (ppt), to organisms other than those for which it has been targeted:

- Shellfish tend to bioaccumulate the toxins.
- As little as 15 ppt can be lethal to hard clam larvae.
- Paint particles inhaled while painting and scraping boat hulls may be harmful to humans.

Concentrations of TBT in Virginia waters have been found to be as high as 190 ppt. Many commercial marine vessels and an estimated 50% of pleasure craft use TBT-based paint.

The General Assembly and the Governor amended the Virginia Pesticide Law as it related to the possession, sale or use of marine anti-foulant paints containing TBT, effective July 1, 1987 (see attached Virginia Code Sections 3.1-249.22 et. seq. as Appendix III-1, p.25 and Appendix III-2, Rules and Regulations for Enforcement of the Virginia Pesticide Law). The Departments of Game and Inland Fisheries, Agriculture and Consumer Services (VDACS) and the Virginia Marine Resources Commission share the responsibility for enforcing regulations promulgated pursuant to the amendment. The statute provides the following:

- The use of anti-foulant paints containing TBT on vessels less than 25 meters in length is prohibited, except those with aluminum hulls.

- Formulations containing TBT in concentrated form and labelled for mixing with paint by the user to produce an anti-foulant boat paint are prohibited from retail sale or private use.

Except as provided below, no person may distribute, possess, sell, offer for sale, apply or offer for use or application any marine anti-foulant paint containing TBT compounds:

- A person may distribute or sell a marine anti-foulant paint containing TBT with an acceptable release rate to the owner or agent of a commercial boatyard who, in turn, may possess and apply it only on vessels in excess of twenty-five meters (82.02 feet) in length or which have aluminum hulls.
- No vessel exceeding 25 meters in length shall be painted with an anti-foulant paint containing TBT unless the paint meets the "acceptable release rate." The, "acceptable release rate" is defined as a measured release rate of 5.0 micrograms per square centimeter per day at steady state conditions as defined by the Environmental Protection Agency.
- All registrations of marine anti-foulant paints containing TBT must be registered with the VDACS and the manufacturer or distributor must certify that the "acceptable release rate" is met.
- A person may distribute, sell or apply to any vessel a marine anti-foulant paint containing TBT having an acceptable release rate if the paint is distributed or sold in an aerosol spray can in a quantity of sixteen liquid ounces or less and is commonly referred to as outboard or lower unit paint.

The use of TBT in boat paint constitutes a serious threat to important marine animal species, especially in the Chesapeake Bay. Therefore, in cooperation with appropriate state agencies, boating activities and boat painting activities conducted in the coastal zone will be monitored to ensure TBT is not used in Virginia's coastal area except as allowed by law.

In addition, the State Water Control Board recently adopted new regulations which provide more stringent standards than EPA's for the instream water quality standard for TBT in salt water. The standard is 0.001 parts per billion (ug/l) rather than 0.10 ppb. Please see Appendix III-3.

Effects of Program Changes on Enforceable and/or Advisory Policies: The inclusion of a TBT regulatory program will support the Fisheries Management Core Regulatory Program

indirectly and will enhance the conservation goals of the fisheries management program to support viable finfish and shellfish resources.

The goals of the advisory policy contained in the VCRMP designed to increase the protection of spawning, nursery, and feeding grounds will be supported by incorporating the TBT regulatory program into the VCRMP. Both the aforementioned policy and program are designed to maintain the biological productivity and integrity of Virginia's fisheries resources.

The proposed changes to the VCRMP will occur by inserting the above "Description" section into the VCRMP document in Chapter III under Core Regulatory Program I.

Program Change Meets Approval Criteria: The TBT regulatory program complements the State's nonpoint source and point source pollution programs and adds to the protection of the living resources and water quality of coastal waters.

The Commonwealth of Virginia considers this a routine program implementation change and requests concurrence in that determination by OCRM.

Appendix IV

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

**1990-1992 Amendments & Additions to Law and Regulations:
Erosion and Sediment Control, January 1993**

VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM
RPI 92-1

Program Change: Routine Program Implementation

Title: Virginia Erosion and Sediment Control Program

Description: The purpose of this program change is to update the existing nonpoint source water pollution control regulatory program of the VCRMP by incorporating the amendments to the Erosion and Sediment Control Law during the period 1988-1992, as authorized by the Virginia General Assembly and the resulting Erosion and Sediment Control Regulations adopted by the Virginia Soil and Water Conservation Board. The objective of the amendments is to more effectively control soil erosion, sediment deposition and non-agricultural runoff to protect the unreasonable degradation of properties, stream channels, waters and other natural resources of the state.

In 1986, when Virginia's Coastal Resources Management Program was established, the Erosion and Sediment Control Law of 1973 was incorporated as a core program. During the General Assembly session of that year, a report was commissioned to identify the financial, technical and statutory impediments to compliance with the Erosion and Sediment Control Law of 1973. House Document No. 15 was based upon the outcome of a study of state and local Erosion and Sediment Control Programs, as well as recommendations from Department staff, concerned citizens and environmental organizations. This document was presented to the Governor and General Assembly in the fall of 1987, and prompted the 1988 General Assembly to enact six bills which amended or otherwise improved the 1973 law. The 1992 General Assembly re-examined and amended the enforcement options and the definition of land-disturbing activity. (See Appendix 92-1a, Virginia Erosion and Sediment Law as amended through 1992, reprinted from Title 10.1, Chapter 5, Article 4 of the Virginia Code.)

The amended legislation contained the following changes:

General Provisions:

Unclear or unnecessary exemptions were eliminated or further qualified. The exemption for projects on federal lands was eliminated, thus allowing the Commonwealth to exercise federal consistency requirements. Exemptions were also removed for telephone and electric utility lines and for railroad construction. The exemption for projects begun prior to program adoption by local government or soil conservation district was removed. The exemption for agricultural engineering operations was clarified by specifically listing exempt activities. Additionally, the exemption for separately built, single-family residences was modified in 1988, and fine tuned in 1991 and 1992. Certain localities are now empowered to regulate these

single-family residences whether or not they are developed in conjunction with multiple construction in subdivision development. This authorization was granted to: (1) any county formally operating under the urban county executive form of government, (2) all localities adjacent, contiguous to, or surrounded by such a county, and (3) the portions of the counties of Bedford, Franklin, and Pittsylvania draining into Smith Mountain Lake.

State authority was strengthened and clarified for oversight of local Erosion and Sediment Control Programs through a provision requiring periodic review of local programs by Department of Conservation's Division of Soil and Water Conservation. Authority was added to regulate significantly eroding areas that are not related to current land-disturbing areas. These areas, termed "erosion impact areas," may be regulated, provided there is documented delivery of sediment onto neighboring properties or into state waters.

Administrative changes were authorized. Staff was increased from 2 to 20 positions for Erosion and Sediment Control within the Division of Soil and Water Conservation. A certification program for local Erosion and Sediment Control officials was authorized to increase competency and consistency. Local plan, review/permitting and inspection fees were raised from \$300 per project to a maximum of \$1000 per project to increase the recovery of funds to provide for increasing local program administrative costs.

Enforcement Provisions

Provisions authorizing performance guarantees were strengthened. Surety requirements were added to bonding provisions. Local governments were authorized to recover from the permittee any difference in cost should the amount of reasonable initiation of maintenance of measures carried out by the locality exceed the amount of the bond. The basis for the release of the guarantee was changed to adequate stabilization of the disturbed area, not simply completion of the land-disturbing activity.

In 1988, civil penalties and charges were authorized as an enforcement tool, with a maximum of \$2000 per violation. A consent clause was added to provide incentive to resolve the violation at an administrative level; if the violator agrees to accept the civil charges, then such charges will be in lieu of a civil penalty. The 1992 General Assembly authorized localities to adopt a *schedule* of civil penalties as an enforcement option for violations of the Program. The intent is for localities to streamline enforcement by standardizing the penalties for types of violations, rather than trying to determine monetary damages on a case by case basis. Upon the determination of a violation by the appropriate general district court, the violator is assessed a civil penalty in accordance with the schedule, not to exceed \$3000. Designation of a particular violation for a civil penalty is in lieu of criminal sanctions and precludes the prosecution of the violation as a misdemeanor.

In addition, the 1988 amendments directed the Virginia Soil and Water Conservation Board to "promulgate regulations for the effective control of soil erosion, sediment deposition and non-agricultural runoff which must be met in any control

program to prevent the unreasonable degradation of properties, stream channels, watersheds and other natural resources in accordance with the Administrative Process Act." The regulations, effective September 13, 1990, were designed to improve the content and enforceability of the 14 General Criteria found in the 1980 *Virginia Erosion and Sediment Control Handbook*, to clarify questions about the law as applied to residential subdivisions, and to provide a standard enforcement procedure at the state agency level. (See VR 625-02-00 Erosion and Sediment Control Regulations attached in Appendix 92-1a.)

The Minimum Standards section strengthens and expands upon the General Criteria. Soil stabilization measures must now be applied in 7, rather than 15 days after a final grade is reached; temporary stabilization measures must be taken for areas which will be dormant for longer than 30, rather than 60 days. The applicant is responsible for stabilization of soil stockpiles on site, as well as those intentionally transported from the project site. A provision was added to give the local program administrator the ultimate determination regarding the establishment of "permanent" vegetative cover. *Immediate* stabilization measures must be applied to earthen structures such as dams, dikes and diversions, upon installation. Sediment basins must be constructed for disturbed areas draining 3, rather than 5 acres; the outfall device must take into account the *total* drainage area flowing through the disturbed area to the basin. A temporary stream crossing of nonerodible material must be constructed if a live watercourse is crossed by construction vehicles more than twice. Public roads must be cleaned daily where sediment is transported and the regulations detail how the sediment is to be removed. Additionally, the regulations strengthen the General Criteria relating to stormwater discharge; man-made receiving channels must be adequate to receive the flow of a 10-year frequency storm without overtopping the banks and a 2-year frequency storm, without causing erosion of channel bed or banks.

Other substantive changes include the requirement that all variances must be approved and documented by the plan approving authority. Periodic inspections by the enforcement authority are required on all projects. Inspections are mandated immediately following initial installation of erosion and sediment controls, within 48 hours of a runoff-producing storm event, and at the completion of the project prior to the release of performance bonds.

The regulations are more specific in addressing residential subdivisions. Individual property owners are not exempt from filing a plan or an agreement covering erosion and sediment control. Land-disturbing activity of less than 10,000 square feet on individual lots is not exempt from the law or regulations. Construction of permanent roads or driveways that disturb greater than 10,000 square feet and serve more than one single-family residence separately built is not exempt.

A standard procedure for enforcement of state agency projects is established. If a state agency has disturbed land for a non-exempt activity without an approved erosion and sediment control plan, a formal "Notice of Permit Requirement" will be sent to the responsible state agency. Where inspections reveal deficiencies in carrying out an approved plan, failure to comply with prescribed actions and deadlines can result in the issuance of a stop work order. Failure of a state agency to comply with a final order gives the director of the Department options for compliance petitioning:

the Secretary of Natural Resources for violations in the Natural Resources Secretariat; for violations in other secretariats, to the appropriate secretary; for violations in other state agencies, to the head of such agency. The matter can be brought to the attention of the Governor if timely compliance is not achieved.

Effects of Program Change on Enforceable and/or Advisory Policies: The inclusion of the new Erosion and Sediment Control Law and Regulations will strengthen the Nonpoint Source Pollution Control Core Regulatory Program. The *Erosion and Sediment Control Handbook*, repealed in 1990 when the regulations were issued, is scheduled to be re-released in the fall of 1992. It has been revised to: (1) incorporate the new Regulations, (2) provide state-of-the-art technology for erosion and sediment control practices, and (3) provide information and clarification to those working within the Program. Although the general format is the same, almost every page has been updated to reflect the advancements in the erosion and sediment control field. The handbook will serve local programs in an advisory capacity and state agencies in a regulatory capacity. Together, the Program and the revised handbook will improve implementation of this core program.

Furthermore, this incorporation will support and enhance Virginia's overall coastal management goals of prevention of environmental pollution and protection of public health, prevention of damage to our natural resource base, and protection of public and private investment. The proposed changes to the VCRMP will occur by updating the Program document in Chapter III under Core Regulatory Program E.

Program Change Meets Approval Criteria: The Erosion and Sediment Control Program supersedes and improves upon the Erosion and Sediment Control Law of 1973 and the General Criteria, functioning as further detailing of Virginia's coastal program by adding to the protection of living resources and water quality of coastal waters.

The Commonwealth considers this a Routine Program Implementation and requests concurrence in the determination by OCRM.

Appendix V

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

**Changes to Barrier Island Policy of the
Coastal Primary Sand Dunes/Reaches Guidelines, January 1993**

VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM
RPI NUMBER 92-2

Program Change: Routine Program Implementation

Title: Barrier Island Policy

Description: The purpose of this program change is to incorporate revisions to the Coastal Primary Sand Dunes Guidelines: Barrier Island Policy and Supplemental Guidelines. The regulations enable the Virginia Marine Resources Commission and localities to consider a broader range of impacts and factors when making important resource management decisions.

The new regulation stems from a decision by the Commission on October 12, 1989 to review the existing Barrier Island Policy and Supplemental Guidelines that were adopted on June 24, 1986. In addition, 1989 amendments to the Coastal Primary Sand Dune Protection Act, substituted the term "beaches" for "reaches", making revisions to the policy document necessary. On August 28, 1990 the Virginia Marine Resources Commission adopted the regulation which became effective October 24, 1990. (See VR 450-01-0058, attached as Appendix 92-2a.)

This regulation gives greater acknowledgement to the fragile and transient nature of barrier islands as landform features, their inherent value as natural heritage resources in their natural state, and their importance as habitat to certain threatened or endangered species. The revised Barrier Island Policy is designed to minimize the impacts associated with low-density, single-family and recreational development as well as to allow for the consideration of both cumulative and secondary impacts in a permit decision. Specifically:

- The regulation recognizes that adverse impacts will be minimized by limiting the density of structures and the percentage of shoreline occupied by structures. The regulation requires that all structures, including septic systems shall be set back from the dune crest 20 times the local 100-year long-term annual shoreline recession rate. Specific requirements are defined for relocation and removal of structures.
- Encroachment upon the nesting sites of threatened and endangered species identified by the Virginia Department of Game and Inland Fisheries or Department of Conservation and Recreation is prohibited and evidence of impact or potential impact on threatened and endangered species shall be considered in permit application.
- In an effort to more closely govern vehicular use, the regulation contains vehicular access restrictions and implements a no-cost, annual permit requirement.
- Exempted from regulation are those military activities essential to

national security as well as the construction, operation and maintenance of Coast Guard facilities.

Effects of Program Change on Enforceable and/or Advisory Policies: The Coastal Primary Sand Dune Guidelines: Barrier Island Policy supports a fuller achievement of the purposes of the Coastal Primary Sand Dune Protection Act. The Policy advances Virginia's coastal management goal of prevention of damage to our natural resource base through the maintenance of wildlife habitat areas and the preservation of endangered species. The revised Barrier Island Policy also supports Virginia's coastal management goal of protection of public and private investment in the reduction or prevention of losses in property, tax base and public facilities caused by shorefront erosion and the minimization of dangers to life and property from coastal flooding and storms.

The proposed changes to the VCRMP will occur by updating the VCRMP document in Chapter III, under Core Regulatory Program D.

Program Change Meets Approval Criteria: The revised policy supersedes and improves upon the 1986 Coastal Primary Sand Dunes Guidelines: Barrier Island Policy and Supplemental Guidelines, functioning as a further detailing of Virginia's coastal program.

The Commonwealth considers this a Routine Program Implementation and requests concurrence in the determination by OCRM.

Appendix VI

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

**Restoration Orders, Civil Charges and Penalties
Available to VMRC and Local Wetlands Boards, August 1993**

VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM
RPI 93-1

August 9, 1993

Program Change: Routine Program Implementation

Title: Restoration Orders, Civil Charges and Penalties Authorized by the 1990 Virginia General Assembly in Chapter 811.

Description: The purpose of this program change is to incorporate the amendments and additions included in Chapter 811 Acts of the Assembly 1990, (See Attached 93-1 Part A), which are contained in Title 28.2 of the Code of Virginia. Effective July 1, 1990, these amendments concerning the regulation of subaqueous lands, tidal wetlands and coastal primary sand dunes authorize the Circuit Court to impose civil *penalties* and the Commission or local wetlands board to issue restoration orders and assess civil *charges* for violations of the applicable statutes.

Specifically, Sections 28.2-1213, 1320, and 1420 empower a Circuit Court judge to levy a civil penalty up to \$25,000 for each day of a violation. These penalties, at court discretion, may be paid directly into the treasury of the locality in which the violation occurred for the purpose of abating environmental damage to, or the restoration of wetlands therein. If the violator is the locality itself, the fines may be paid directly into the state treasury. These amendments also grant the Commission and wetlands boards the authority to assess civil charges of up to \$10,000 per violation. Civil charges are to be paid in lieu of any appropriate civil penalty and can be assessed only with the consent of the person in violation. Civil charges may be levied in addition to the cost of any ordered restoration.

If the Commission or Wetlands Board deems it desirable for the affected site to be returned to predevelopment conditions, Section 28.2-1316 (D) grants authority to issue restoration orders to recover lost resources or to prevent further damage to resources. A restoration order results from the issuance of a sworn complaint along with the provision of 30 day notice to the affected party including the time, place and purpose of the restoration hearing. The order should require the submission of a complete restoration monitoring plan to ensure successful re-establishment of the affected resources, detailing the project and formalizing the performance standards by which the restored area will be evaluated over the long term. The restoration order may also require a prepaid contract acceptable to the board be in effect for the purpose of carrying out the monitoring plan. Additionally, the board may require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to securing compliance with the conditions set forth in the restoration order. Failure to complete the required restoration constitutes a separate violation.

Effects of Program Change on Enforceable and/or Advisory Policies: These Chapter 811 changes significantly strengthen the enforcement capacities of the (tidal) Wetlands Act, the Coastal Primary Sand Dunes Protection Act, and the Subaqueous Lands Act.

In the past, violations of the aforementioned code sections usually resulted in either voluntary restoration, or more frequently, submittal of an after-the-fact application for permit. The intent of both the civil penalties and charges is to provide strong financial disincentives against violating the law while at the same time providing the impetus to resolve these issues at an administrative level.

The amendments support Virginia's overall coastal management goals of: protecting ecologically significant tidal marshes; minimizing damage to the productivity and diversity of the marine environment resulting from alteration of subaqueous lands and aquatic vegetation; conserving the coastal sand dune system; and, minimizing danger to life and property from coastal flooding and storms.

The proposed changes to the VCRMP will occur by updating the VCRMP document in Chapter III, under Core Regulatory Program D.

Program Change Meets Approval Criteria: The additions and amendments of Chapter 811, Acts of the 1990 Assembly improve upon the (tidal) Wetlands Act, the Coastal Primary Sand Dunes Protection Act, and the Subaqueous Lands Act, functioning as further detailing of Virginia's Coastal Program.

The Commonwealth considers this a Routine Program Implementation and requests concurrence in this determination by OCRM.

Appendix VII

ROUTINE PROGRAM IMPLEMENTATION Virginia Coastal Resources Management Program

Virginia Water Protection Permit and Regulations, August 1993

VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM
RPI NUMBER 93-2

Program Change: Routine Program Implementation

Title: Virginia Water Protection Permit and Regulations

Description: The VCRMP contains a core regulatory program for point source water pollution control which includes the § 401 certification program administered by the Virginia Water Control Board (refer to VCRMP RPI NUMBER TWO, dated October 31, 1988). The purpose of the present RPI is to incorporate, within this core program, the statutory and regulatory provisions of the Virginia Water Protection Permit (VWPP). The VWPP statute, *Virginia Code*, Section 62.1-44.15:5., was enacted by the Virginia General Assembly in 1989 and amended in 1990. Since the adoption of the VWPP regulations by the Water Control Board in May of 1992, this permit has served as Virginia's § 401 certification for federally permitted activities (particularly under § 404) and has improved the link between the authority of the Clean Water Act and Virginia's State Water Control Law. (A copy of the VWPP statute and regulations are included in Part A).

The VWPP neither modifies nor expands the federal authority granted to the State Water Control Board through Section 401 of the Clean Water Act. The VWPP completes the circle of federal/state authorization and legal defensibility for § 401 program implementation in Virginia by providing state level sanction for its operation. The VWPP statute is the Commonwealth of Virginia's formal authorization to the State Water Control Board to make use of § 401 authority. The State Water Control Board has interpreted and applied this authority through the VWPP regulations, which provide guidance, in certain areas, for how the § 401/VWPP program should be implemented.

The VWPP program provides a state regulatory framework for implementation of federal § 401 authority. It also emphasizes the interest of the General Assembly and the State Water Control Board that this authority be used to protect minimum instream flow levels and to regulate activities which may damage nontidal wetlands. The importance of the implementation of § 401 of the Clean Water Act to the protection of water quality and living resources in Virginia's coastal zone is presented and summarized in VCRMP RPI Number Two of 1988.

Final adoption of the VWPP regulations followed substantial public involvement in the regulatory process (a summary of the public involvement into this process is included in Part C). These regulations supersede the State Water Control Board's Procedural Rule 3, relating to § 401 certification. However, administration of the Virginia Water Protection Permit uses the same Joint Permit Application, and is based

on the same water quality protection goals, as Virginia's § 401 Program and will continue to meet the same program criteria.

The regulation of the placement of dredged or fill material is the principal federal authority which leads to § 401 review and certification by the Commonwealth of Virginia. As a tool for regulating fill activities, it is important to note that the implementation of § 401 authority and the VWPP includes elements and requirements which address nonpoint source pollutant loadings as well as point source pollutant loadings into Virginia's waters.

The VWPP reinforces the § 401 Program's connection to Virginia's State Water Control Law, including the concept of "beneficial uses" which is part of the foundation for water resource management decisions in Virginia. This connection is implied, as a result of judicial interpretations of § 401 authority, but is strengthened by the state framework of the VWPP. Paragraph B of the VWPP statute requires the Water Control Board to determine "...that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses." The statute continues in defining the "...preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values..." as beneficial uses of Virginia's waters.

The VWPP program addresses the Virginia Water Control Board's state level management interest, as authorized federally under § 401, over two important natural resources: adequate instream flow levels and nontidal wetlands. With respect to instream flow levels, the VWPP statute specifically authorizes the Water Control Board to place conditions on any Virginia Water Protection Permit including, but not limited to "...the volume of water which may be withdrawn as a part of a permitted activity." Section 2.4.1 of the VWPP regulations elaborate the types of instream flow conditions which may be applied to include the "...rate at which water may be withdrawn at certain times and conditions that require water conservation and reductions in water use." In Section 1.1 of the VWPP regulations, "Surface water" is specifically defined to include "interstate wetlands", consistent with Federal definition, and in compliance with a directive of the U.S. Environmental Protection Agency regarding Water Quality Standards for Wetlands. This definition brings wetlands under the regulatory oversight of the VWPP Program.

The VWPP Program, including numerous provisions within the regulations, provides a state regulatory framework and permitting process to the protection and management of natural and coastal resources through the implementation of existing Federal § 401 authority. Section 1.1 of the regulations provides consistent statewide definitions, to the regulated community, for the implementation of this authority. Part II of the regulations establishes the procedures and requirements for permit application and issuance, including requirements for monitoring (Section 2.2.G), implementation of

Best Management Practices (Section 2.4.6) and for mitigation of adverse environmental impacts (Section 2.5.A.3). Part III of the regulations sets forth the requirements for public involvement into the regulatory process. And Part IV addresses permit modification, revocation, reissuance, termination and denial.

Effects of Program Change on Enforceable and/or Advisory Policies: As a regulation of the State Water Control Board, the regulations (and any associated conditions or requirements) of the VWPP Program are enforceable under Articles 5, "Enforcement and Appeal Procedure" and 6, "Offenses and Penalties" of Virginia's State Water Control Law. (A copy of Articles 5 and 6 of the State Water Control Law is included as Attachment 1).

The VWPP Program strengthens the enforceable § 401 certification program within Virginia's core point source water pollution control program by adding a state regulatory framework and process to the existing Federal authority granted to states in § 401 of the Clean Water Act. The primary reasons for developing the VWPP program include: providing a state regulatory framework for implementation of § 401 authority and emphasizing the interest of the General Assembly and the State Water Control Board that this authority be used to manage and protect minimum instream flow levels and nontidal wetlands. However, as concluded by the Virginia Attorney General, the VWPP statute "...grants the State Board no additional power" beyond the combined authorities it already had under § 401 of the Clean Water Act and Virginia's State Water Control Law (refer to Attorney General's opinion, included as Attachment 2). Therefore, this program change is a "...(f)urther detailing of..." Virginia's Coastal Resources Management Program and does not warrant full program amendment.

The VWPP Program is directly based on statutory and regulatory authority of the Commonwealth of Virginia and the federal Clean Water Act. Elements of this program are directly supported by an opinion of the Virginia Attorney General.

Location of Program Change in VCRMP Document: The proposed changes to the VCRMP will be inserted in the VCRMP document in Chapter III as part 3 of core regulatory program F. The VWPP statute and regulations will replace SWCB Procedural Rule 3 in Appendix III-13. The "Part I - Overview" section of the VCRMP will be modified and expanded slightly to incorporate the addition of the VWPP program and to discuss how the implementation of federal authority over the placement of dredged or fill material can be used to protect valuable coastal resources of the Commonwealth.

Program Change Meets Approval Criteria: The proposed program change will strengthen Virginia's ability to support state decisions on natural and coastal resource management, particularly over nontidal wetlands and instream flow levels, as implemented through § 401 authority of the Clean Water Act. The Commonwealth of Virginia considers this a routine program implementation change and requests concurrence in that determination by the Office of Ocean and Coastal Resource Management.



This principle of the VWPP Program was supported by an opinion of the Virginia Attorney General which states that permit conditions placed on § 401 certifications by the Commonwealth of Virginia can be based on: "...any other appropriate requirement of State Law' under the State Water Control Law, consistent with its water quality management program. 33 U.S.C.A. § 1341(d). That program includes water quality, maintenance of instream flows, maintenance of recreation uses, support of propagation and growth of all aquatic life, and other uses identified by the State Water Control Law and its implementing regulations.". (A copy of the Attorney General's opinion is included as Attachment C).